



## **DEPARTMENT OF HEALTH AND HUMAN SERVICES**

### **Administration for Children and Families**

#### **45 CFR Part 1355 and 1356**

#### **RIN 0970-AC91**

### **Separate Licensing or Approval Standards for Relative or Kinship Foster Family Homes**

**AGENCY:** Children’s Bureau (CB); Administration on Children, Youth and Families (ACYF); Administration for Children and Families (ACF); Department of Health and Human Services (HHS).

**ACTION:** Final rule.

**SUMMARY:** This rule finalizes revisions to the definition of “foster family home” proposed on February 14, 2023 (here after referred to as the February 2023 NPRM). Title IV-E agencies may choose to claim title IV-E federal financial participation (FFP) for the cost of foster care maintenance payments (FCMP) on behalf of an otherwise eligible child who is placed in a relative or kinship licensed or approved foster family home when the agency uses different licensing or approval standards for relative or kinship foster family homes and non-relative/non-kinship foster family homes. In addition, the final rule requires title IV-E agencies to periodically review the amount of FCMPs to also ensure that the agency provides a licensed or approved relative or kinship foster family home the same amount of FCMP that would have been made if the child was placed in a non-related/non-kinship foster family home.

**DATES:** This rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Kathleen McHugh, Director, Policy Division, Children’s Bureau, (202) 205-8618. Telecommunications Relay users may dial 711 first. Email inquiries to [cbcomments@acf.hhs.gov](mailto:cbcomments@acf.hhs.gov).

## **SUPPLEMENTARY INFORMATION**

### Table of Contents

- I. Statutory Authority
- II. Background
- III. Overview of February 2023 NPRM Comments
- IV. Section-by-Section Responses to Comments
- V. Regulatory Process Matters
- VI. Tribal Consultation Statement

### **I. Statutory Authority**

This rule is published under the authority granted to the Secretary of Health and Human Services (the Secretary) by section 1102 of the Social Security Act (the Act), 42 U.S.C. 1302. Section 1102 of the Act authorizes the Secretary to publish regulations, not inconsistent with the Act, as may be necessary for the efficient administration of the functions with which the Secretary is responsible under the Act.

### **II. Background**

Each state and tribal licensing entity is responsible for establishing and maintaining licensing or approval standards for foster family homes. The Act requires only that such standards established by the state or tribe are reasonably in accord with recommended standards of national organizations for foster family homes related to admission policies, safety, sanitation, protection of civil rights, and use of the reasonable and prudent parenting standard (section 471(a)(10)(A) of the Act), and that the caregiver fully meet federal requirements under section 471(a)(20) of the Act (concerning criminal background checks for all foster parents). The Act permits a title IV-E agency to waive non-safety-related licensing or approval standards for relative foster family homes on a case-by-case basis (section 471(a)(10)(D) of the Act). The Act also requires title IV-

E agencies to provide a periodic review of licensing or approval standards and amounts paid as foster care maintenance payments (FCMP) and adoption assistance to assure their continuing appropriateness (section 471(a)(11) of the Act; 45 CFR 1356.21(m)).

In 2000, ACF promulgated regulations that interpreted the Act to require that each state establish and apply its licensing or approval standards to all relative and non-relative foster family homes (45 CFR 1355.20). In the years following promulgation of the 2000 rule, research (Miller, Jennifer, “Creating a Kin-First Culture,” American Bar Association, July 1, 2017) concluded that children in foster care often do best when placed with relatives and kin because: 1) family connections are critical to healthy child development and a sense of belonging; 2) relative and kinship care helps to preserve children’s cultural identity and relationship to their community; and 3) children living with relatives experience fewer behavioral problems and higher placement stability rates compared to children living with non-relatives in foster care (88 FR 9414; (Child Welfare Information Gateway. (2022). Kinship care and the child welfare system. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. <https://www.childwelfare.gov/pubs/f-kinshi/>); Generations United and National Indian Child Welfare Association. (2020). TOOLKIT – American Indian and Alaska Native Grandfamilies: Helping Children Thrive Through Connection to Family and Cultural Identity. [www.gu.org](http://www.gu.org) and [www.nicwa.org](http://www.nicwa.org); (“How can we prioritize kin in the home study and licensure process, and make placement with relatives the norm?” Casey Family Programs, 2020). Congress subsequently amended title IV-E of the Act to prioritize placements with and involvement of relatives when a child is removed from their home (sections 471(a)(19) and (29) of the Act).

Consistent with the research cited above and Congress’s amendments, ACF published the February 2023 NPRM proposing to allow a title IV-E agency to adopt one set of licensing or

approval standards for all relative or kinship foster family homes that is different from the licensing or approval standards used for non-relative/non-kin foster family homes. ACF determined relative and kinship care is often the best option for children in foster care. However, current licensing standards may serve as a barrier to such placements (Miller, “Creating a Kin-First Culture,” July 1, 2017; Children’s Defense Fund. Recommendations to Ensure Children’s Well-being through Support of Kinship Caregivers; (“How can we prioritize kin in the home study and licensure process, and make placement with relatives the norm?” Casey Family Programs, 2020). For example, relatives and kin who provide care for a child in foster care may be denied a foster family home license or approval because they have not met strict licensing standards, including non-safety standards that the state may waive under current federal law. Thus, the relative or kin caregiver is not eligible for FCMPs. Another example is that many states require the same time-consuming and intensive foster parent training classes for relatives and kin as they do for non-relatives. However, relative and kin caregivers may require a different level or type of foster parent training to take care of their kin, particularly when they already know the child for whom they are going to provide care. Non-relative foster parents may need training about how to integrate a child into a home with which the child is unfamiliar, or how to determine the child’s interests and skills. Similarly, in contrast with non-relative foster parents, who prepare for the arrival of children in foster care over months and years, relatives often receive a request to care for a child in emergency situations. In addition, relatives become licensed to care for a child who is a relative, not because they want to be a foster parent to children in foster care. Therefore, relative and kin licensing standards that allow for training that is condensed and more relevant to relative and kinship families along with the necessary essential agency support for foster parents could pave the way to remove barriers to licensing relatives. Allowing title IV-E agencies to adopt separate standards for relatives and kin could remove some barriers to licensing and increase the number of licensed or approved relative or kinship foster family homes receiving services and financial resources (88 FR 9413; Foster

Family-based Treatment Association. The Kinship Treatment Foster Care Initiative Toolkit. Hackensack, NJ: Foster Family-Based Treatment Association, 2015, Page 14; U.S. Government Accountability Office, Child Welfare and Aging Programs: HHS Could Enhance Support for Grandparents and Other Relative Caregivers (GAO-20-434), July 2020)).

In anticipation of a final rule, the February 2023 NPRM encouraged title IV-E agencies to consider adopting licensing or approval standards for all relative or kinship foster family homes that place as few burdens on such families as possible, such as standards that meet only the requirements in sections 471(a)(10)(A) and (a)(20) of the Act, and not additional standards the agency requires non-relative foster family homes to meet (88 FR 9413). As noted above, the Act requires only that such standards established by the state or tribe are reasonably in accord with recommended standards of national organizations for foster family homes related to admission policies, safety, sanitation, protection of civil rights, and use of the reasonable and prudent parenting standard (section 471(a)(10)(A) of the Act), and that the caregiver fully meet federal requirements under section 471(a)(20) of the Act (concerning criminal background checks for all foster parents). Or, the agency could implement state or tribal licensing standards for all relative or kinship foster family homes to extend age limits for relative or kinship foster care providers; allow relative children to share sleeping spaces; disregard certain income, transportation, literacy, language, and education requirements; and remove disqualifications for non-child-related past crimes such as issuing bad checks (Beltran and Redlich Epstein, Improving Foster Care Licensing Standards around the United States: Using Research Findings to Effect Change, February 2013; “How can we prioritize kin in the home study and licensure process, and make placement with relatives the norm?” Casey Family Programs, 2020.).

## **Equity Impact**

This final rule advances the Administration's priority of equity for those historically underserved and adversely affected by persistent poverty and inequality by providing a support to low-income prospective relative caregivers, many of whom are families of color, are from underserved rural areas, or are members of other communities in which long-term systemic factors such as poverty hamper families from making intergenerational progress.

This final rule would especially provide a support to low-income prospective relative caregivers, many of whom are families of color, are from underserved rural areas, or are members of other communities in which long-term systemic factors such as poverty hamper families from making intergenerational progress. Ethnically and culturally diverse populations are disproportionately represented in relative and kinship families. "While Black or African American individuals represent just 13% of the U.S. population, they make up nearly a quarter of all children in households where a grandparent is responsible for the needs of the child" (Advisory Council to Support Grandparents Raising Grandchildren with Assistance from the HHS Administration for Community Living. Supporting Grandparents Raising Grandchildren (SGRG) Act, Initial Report to Congress. Washington, DC: Author, p. 4, November 16, 2021.). "Similarly, American Indian and Alaska Natives make up only 1.3% of the U.S. population, but their representation in grandparent-led households where the grandparent is providing for most of their needs, is more than double that rate (U.S. Census Bureau, 2019). The available data on grandparents responsible for grandchildren suggests that underserved racial and ethnic populations are disproportionately taking responsibility for grandchildren." (Advisory Council to Support Grandparents Raising Grandchildren with assistance from the HHS Administration for Community Living. [November 16, 2021]. Supporting Grandparents Raising Grandchildren (SGRG) Act, Initial Report to Congress. Washington, DC: Author, p. 12). Moreover, many individuals in these communities face simultaneous, multiple barriers when attempting to provide care to a relative who has been removed from their home.

Policies that expand access to FCMPs can have an especially strong impact on underserved groups. Encouraging and removing barriers to kinship placement also is consistent with cultural norms of some underserved groups that traditionally rely more heavily on kin and family in times of need. For example:

- Children age 3 to 5 who are the subject of a child maltreatment report in rural areas and those in households with incomes less than 50 percent of federal poverty level were more likely to be placed in informal kinship settings than similarly situated children in urban areas (Walsh, W.A. Informal Kinship Care Most Common Out-of-Home Placement After an Investigation of Child Maltreatment [Fact Sheet no. 24]. Durham, NH: University of New Hampshire, Carsey Institute, 2013.).
- African American families rely on extended family and other informal systems of care not only because these informal systems are cultural strengths, but because African American children historically were excluded from public and private sector child welfare programs and supports (U.S. Government Accountability Office, Child Welfare and Aging Programs: HHS Could Enhance Support for Grandparents and Other Relative Caregivers (GAO-20-434), July 2020).
- Traditionally, grandparents and other family members assume integral roles in raising children within American Indian/Alaska Native communities. This type of extensive familial support system helps parents to pass on to their children the knowledge of customs, culture, and language essential to community survival and well-being (Capacity Building Center for Tribes. Engaging and Supporting Native Grandfamilies. 2022.

<https://tribalinformationexchange.org/files/products/GrandfamiliesResourceList2022.pdf>; Lewis, Jordan & Boyd, Keri & Allen, James & Rasmus, Stacy & Henderson, Tammy. (2018). “We Raise our Grandchildren as our Own:” Alaska Native Grandparents Raising Grandchildren in Southwest Alaska. *Journal of Cross-Cultural Gerontology*. 33. 10.1007/s10823-018-9350-z.).

### **III. Overview of February 2023 NPRM Comments**

We received submissions from 207 commenters about the February 2023 NPRM. We reviewed and analyzed the public comments and considered them in finalizing this rule. The comments are available in the docket for this action on Regulations.gov. We received comments from 27 state and local government child welfare agencies; 10 American Indian/ Native American Tribes, tribal consortia and tribal organizations (“tribes”) and entities representing tribal interests; 72 national advocacy, public interest, philanthropic and professional organizations; 20 service providers; 2 educational associations; 9 members of Congress; and 67 individuals. Almost all commenters supported issuing a final rule and many requested clarifications, which we address in the Section-by-Section response to comments.

#### **Summary of Comments by Type**

Summary of Comments from Individuals. We heard from 67 individuals, most of whom identified themselves as relatives and kin with lived experience as caregivers. A few of the individual commenters said they were non-related foster parents and other individuals not identifying as caregivers. We appreciate the willingness of relatives, kin, non-related caregivers, and other individuals to share personal details of their lived experiences to help inform this rulemaking. The relative and kin commenters, most of whom identified themselves as grandparents caring for their grandchildren, overwhelmingly expressed that their experiences caring for a child who cannot safely remain with their parent(s) resulted in the best possible outcomes for the child and was critical to keeping their families together. They also said that such a decision was not made without considerable hardship. Relative and kin commenters noted challenges with meeting foster family home licensing standards for reasons such as too many people were living in the home or there were not enough beds or rooms for the children. They also discussed incurring financial hardship partly because they were not receiving financial



support from the title IV-E agency. The relative and kin commenters said that caring for a child resulted in them delaying retirement, depleting savings and retirement funds, incurring attorney fees, substantial child care costs, and in some cases, the commenters said they had to file for bankruptcy and experienced home foreclosure.

Summary of Comments from Tribes and Entities Representing Tribal Interests. All ten of the tribes, tribal organizations, consortia and organizations representing tribal interests that commented on the February 2023 NPRM supported the proposal for separate licensing or approval standards for relatives and kin. They cited various reasons including the necessity of involving relatives and kin in the determination of what is in the best, short and long term interests of tribal children; the importance of relative and kin placements in maintaining an Indian child's connection to their culture, heritage, and traditions and the importance of this connection to building relationships that will continue throughout the child's lifetime; supporting tribal relative and kinship families with resources and services; removing barriers to families interested in providing relative foster care to tribal children; and because placements with relatives and kin support strong attachment and bonding that can generate profound and long lasting benefits to the child. Commenters also said that this proposal provides an opportunity for state and tribal title IV-E agencies to collaborate on the development of separate licensing or approval standards that align the needs of Indian children and families with varied lived experiences and from different socioeconomic backgrounds. For example, commenters mentioned that states and tribes could collaborate on training options that are culturally appropriate. Many tribal commenters also said that placement with relatives and kin when safely possible is consistent with the Indian Child Welfare Act of 1978 (ICWA), emphasizing the importance of the extended family in Native American cultures where definitions of families are often broader and can include people who are not blood relatives but may be members of the same clan. Finally, commenters emphasized that ensuring relative and kinship foster family

homes receive FCMPs equal to those provided to non-related foster family homes is necessary to support a child's needs to grow up safe, nurtured, and strong.

Summary of Comments from States and Local Government Agencies. Nearly every state child welfare agency that submitted a comment supported the proposal for separate licensing or approval standards for relatives and kin noting that it builds on the efforts many of the agencies have already implemented to establish a "kin-first" culture that prioritizes relative and kin placements. Nearly all state agencies that commented expressed an intention to adopt separate licensing or approval standards for relatives and kin once the rule is final. A few state and local government non-child welfare agencies also submitted comments in support of the proposal.

Summary of Comments from National Advocacy, Public Interest, Philanthropic, Professional Organizations and Members of Congress. Seventy-two national advocacy, public interest, philanthropic and professional organizations supported the proposal because of the benefits it offers to children in out-of-home care, as explained in greater detail in the paragraph below. Nine members of Congress supported issuing a final rule and several suggested that states work collaboratively with relatives/kin and organizations that support relative/kinship caregivers on developing separate licensing standards for relatives and kin to ensure that the lived experiences of those caregivers are appropriately reflected in the new licensing standards.

### **General Comments in Support of the February 2023 NPRM**

Summary of Comments on the Benefits of the Final Rule. Overwhelmingly, commenters believed that the separate licensing standards will ensure the safety, permanency and well-being of children in out-of-home care. For example, commenters said the proposal:

- Aligns with research that demonstrates the benefits and improved life-long outcomes for children placed with relatives and kin. For example, one commenter cited to research that

children and young people in kinship care experience improved placement stability, higher levels of permanency, and decreased behavioral problems (Epstein, (2017) Kinship Care is Better for Children and Families). Another commenter cited to research that found children raised by family members (as compared to non-kin foster parents) have better behavioral and mental health outcomes, rate their situation more favorably, and are more likely to report feeling loved (Generations United. (2016). Children Thrive in Grandfamilies: [www.grandfamilies.org/Portals/0/16-ChildrenThriveinGrandfamilies.pdf](http://www.grandfamilies.org/Portals/0/16-ChildrenThriveinGrandfamilies.pdf) AARP. (2022).

- Supports relative and kin placements because they are more trauma-responsive and help maintain and support family, school, community and cultural connections for children in foster care.
- Increases the number of available out-of-home placement resources and prevents unnecessary group or child care institution (also known as congregate care) placements.
- Allows title IV-E agencies to craft licensing or approval standards that align with tribal values, culture, and traditions which emphasize the importance of the extended family to keep children safe and support family healing.
- Removes bureaucratic barriers to licensing and approving relative and kinship foster family homes by, for example, reducing the number of variances and waivers a title IV-E agency must individually approve, which may result in a more streamlined process and timely licensing or approval of relatives/kin.
- Helps alleviate financial hardships experienced by relative and kinship foster families. For example, one of the commenters explained that in their state, a child living with a traditional foster parent receives between \$544 to \$656 per month, whereas a child living with an unlicensed relative caregiver only receives \$388. This disparity directly affects the ability of relative caregivers to meet the needs of these children. Another commenter explained that in one state, seniors 65 – 84 who are below the median income earn, at

most, \$41,700 annually. If they take in two children or youth for half a year, their daily costs for caring for those children essentially drive their income to within \$1,000 of the poverty line for a family of four (\$27,756). Yet another commenter explains that in their state, fewer than 30 percent of relative foster family homes were licensed and the only financial resources available to these families were eligible for was non-needy TANF, which is \$654 per month to care for three children, compared to the FCMP of \$2,016 - \$2,430 per month to care for three children (or higher for higher levels of need).

- Additionally, almost all commenters that addressed the proposal in § 1356.21(m) stated that the amount paid to a licensed or approved relative or kinship foster family home should be the same amount that would have been made if the child was placed in a licensed or approved non-relative/kin foster family home. Almost all states that commented confirmed they already provide equitable FCMPs to relative and kinship foster family homes and non-related foster family homes.

Comments About the Equity Impact of the Rule. Many commenters expressed that the proposal would expand access to FCMPs, which can have an especially strong impact on underserved groups because encouraging and removing barriers to kinship placement also is consistent with cultural norms of some underserved groups that traditionally rely more heavily on kin and family in times of need. Some commenters noted the final rule may generate opportunities for states to collaborate with groups disproportionately represented in foster care placements when developing separate licensing or approval standards. Several commenters expressed support for the February 2023 NPRM stating that it will align with the racial, cultural, and ethnic norms of African American, American Indian and Alaskan Native children and families. A few commenters emphasized that the rule may also benefit youth who identify as lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+), and who are often placed in institutional

or congregate care. One commenter pointed out that for LGBTQI+ youth, delaying or denying their placement with the people who know and love them because their kin cannot meet licensure standards denies the youth a critical lifeline.

### **Comments Not in Support of the February 2023 NPRM**

Less than a dozen individual commenters did not support allowing separate licensing standards for relative and kinship foster family homes. A few individuals expressed concerns that standards for relative and kinship placements are already too minimal, and that this would impact the children placed with them, creating the potential for placement disruption and repeated trauma. Rather, they suggested the requirements for relative placements should increase instead of decrease because relatives and kin are often unprepared for the kinds of trauma children and youth who are in foster care have experienced. In addition, a few commenters who did not support the proposal expressed the view that it is the duty of title IV-E agencies to ensure that each child is provided with a safe and loving foster home, regardless of the caregiver's connection to the child and that if a relative is taking in a child, the relative should meet the same standards as other licensed or approved and paid foster parents. We address these comments in section IV below.

### **Recommendations for Separate Licensing Standards for Relative and Kinship Foster Family Homes**

Many commenters from advocacy, public interest, and professional associations expressed agreement with ACF's recommendations that separate licensing or approval standards for relatives and kin only include the requirements in the Act. Specifically, those commenters agree that for relative and kinship licensing standards, title IV-E agencies should not prohibit licensing due to crimes committed beyond those enumerated in section 471(a)(20) of the Act. A couple of commenters noted that in some states, licensing or approval standards prohibit foster parents

from becoming licensed or approved due to convictions for crimes that extend beyond those required by the Act, such as misdemeanors that may have occurred in the relative's or kin's youth.

### **Comments Outside the Scope of the Regulation**

We received several comments outside the scope of this regulation, and therefore, we are unable to address most of those comments. These types of comments included: specific individual scenarios related to eligibility to receive FCMPs, payment or licensing issues; informal kinship care involving children who are not under the placement and care responsibility of the title IV-E agency; recommendations for access and availability of specific kinship services; questions about licensing procedures for relatives that want to care for both related and non-related children; interstate placements; application of additional non-discrimination procedures; questions about how the requirements in section 471(a)(10) of the Act would apply to separate licensing standards and the ACF National Model Standards; recommendations for developing model standards; implementation of retrospective analysis and data collection using regulatory outcome measures; implementation and financial challenges for county administered states; and de-linking eligibility for title IV-E FCMPs from the 1996 Aid to Families with Dependent Children income and eligibility standards in section 472 of the Act. However, we will address the comments raised on claiming title IV-E FCMPs before all title IV-E requirements for foster family homes are met in the Section-by-Section Response to Comments so we can clarify the requirements.

### **IV. Section-by-Section Responses to Comments**

We respond to the comments we received in response to the February 2023 NPRM in this section-by-section discussion.

## Section 1355.20 Definitions

The definition of “foster family home” no longer contains “[f]oster family homes that are approved must be held to the same standards as foster family homes that are licensed,” and “the term may include group homes, agency-operated boarding homes or other facilities licensed or approved for the purpose of providing foster care by the state or tribal agency responsible for approval or licensing of such facilities.” The definition now includes: “Agencies may establish one set of foster family home licensing or approval standards for all relative or kinship foster family homes that are different from the set of standards used to license or approve all non-relative foster family homes.”

We did not receive any specific recommendations for revisions to the definition of foster family home, therefore, we are not making any substantive changes to the proposal. We are, however, making a technical correction to the second sentence of the definition to add the terminology “or approval” for consistency with the rest of the paragraph. The regulation text would read as follows: “The licensing or approval authority must be a state authority in the state in which the foster family home is located, a tribal authority with respect to a foster family home on or near an Indian Reservation, or a tribal authority of a tribal title IV-E agency with respect to a foster family home in the tribal title IV-E agency's service area.”

As described earlier, we received very few comments that did not support the proposal, and numerous comments in support of the revisions to the definition of foster family home to allow for separate licensing and approval standards for relatives and kin from non-relatives/kin. In addition, there were commenters who provided suggestions and recommendations for changes to regulations that are outside the scope of this proposal, but we address them here.

Comment: A few commenters expressed concern that states would develop separate licensing standards for relatives and kin that will impose more requirements than for non-

relatives and non-kin standards. They requested explicit language that kinship licensing standards cannot be more stringent or demanding than non-relative foster family licensing.

Response: This is not the intent of the proposal as we fully explained in the preamble to the February 2023 NPRM. However, foster family home licensing and approval standards are determined by states and tribes. ACF does not have authority to mandate standards beyond what is required by the Act.

Comment: Many of the commenters recommended expanding the definition of relative and kin to include individuals related to a child by tribal custom. They explained that tribal custom often defines who is considered a relative in tribal communities and many relatives and kin already have existing relationships established with their relative children. Some commenters recommended a broader expansion of the definition of relative and kin to include individuals who may not have a relationship with the child but may have strong relationships established with the child's family.

Response: We would like to clarify that ACF did not propose a new definition of relative or kin. As stated in the February 2023 NPRM, title IV-E agencies have discretion to define "relative" and "kin" when determining to whom they will apply the relative licensing and approval standards. We encourage agencies to define relative and kin in a way that is inclusive of tribal custom and adopt a broad definition of relative and kin for purposes of licensing and approval standards.

Comment: One commenter expressed concern that the rule would newly require full licensure for relative and kin placements by including language that "anything less than full licensure or approval is insufficient for meeting Title IV-E eligibility requirements" and the ability to seek reimbursement for foster care maintenance payments. A few commenters expressed the opposite concern that the standards for relative and kinship placements are already too minimal.



Response: We would like to clarify that it is not a new requirement for any foster parent to be fully licensed or approved in order for an otherwise eligible child who is placed with that foster parent to meet title IV-E eligibility requirements. Full licensure or approval is already required in the regulatory definition of “foster family home” and the February 2023 NPRM did not propose to amend it.

Comment: The same commenters suggested the requirements for relative placements should increase instead of decrease because relatives and kin are often unprepared for the kinds of trauma children and youth who are in foster care have experienced and that this would impact the children placed with them, creating the potential for placement disruption and repeated trauma.

Response: As we explained in section II above and in the NPRM at 88 FR 9414, research demonstrates that children living with relatives experience higher placement stability rates compared to children living with non-relatives in foster care. Further, the vast majority of commenters agree that relative and kin placements are more trauma-responsive and help maintain and support family, school, community and cultural connections for children in foster care.

Comment: A few commenters who did not support the proposal expressed the view that it is the duty of title IV-E agencies to ensure that each child is provided with a safe and loving foster home, regardless of the caregiver’s connection to the child and that if a relative is taking in a child, the relative should meet the same standards as other licensed or approved and paid foster parents.

Response: We agree that in order to receive federal foster care maintenance payments for title IV-E eligible children, title IV-E agencies must ensure that all licensed or approved foster family homes meet the same safety requirements in sections 471(a)(10) and (20) of the Act.

Comment: Many commenters requested that ACF clarify when title IV-E agencies can

begin to claim FFP for FCMPs made on behalf of children placed in relative foster family homes that are pursuing licensing or approval under separate standards. The commenters suggested that ACF allow a title IV-E agency to adopt separate licensing or approval standards wherein the agency may begin claiming FFP for children placed with relatives and kin, often in emergency circumstances, once in-state criminal background checks show that the applicant does not have a relevant felony conviction and the fingerprint background check of the national criminal database has been initiated.

Response: While the suggestions are outside the scope of the February 2023 NPRM, we would like to clarify that title IV-E agencies may claim foster care maintenance payment costs from the first day of the child's placement in the month in which all title IV-E eligibility criteria are met. However, in accordance with the statute: (1) anything less than full licensure or approval is insufficient for meeting title IV-E eligibility requirements as the foster family home must be fully licensed or approved as meeting the standards the agency establishes in accordance with the definition of "foster family home" and; (2) title IV-E FCMPs can be claimed for an eligible child only for the days that the foster parents' criminal records check have been completed and the records reveal that the parents did not commit any prohibited felonies in section 471(a)(20)(A)(i) and (ii) of the Act. (See the Children's Bureau Child Welfare Policy Manual section 8.4F, Q/A #38).

#### Section 1356.21(m) Review of payments and licensing standards

Section 1356.21(m) requires that during a title IV-E agency's periodic review of FCMPs and licensing standards as required in 471(a)(11) of the Act, the agency must also review the amount paid to a licensed or approved relative or kinship foster family home to ensure it is the same amount that would have been paid if the child was placed in a licensed or approved non-relative foster family home. As described earlier, we received numerous comments supporting equal

FCMPs to licensed or approved relative and kinship foster family homes and non-relative/kin foster family homes and are therefore not making any changes in the final rule.

## **V. Regulatory Process Matters**

### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to, and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866, emphasizing the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule meets the criteria for a significant regulatory action under Executive Order 12866 and subject to OMB review. Based on ACF's estimates of the likely costs associated with this rule, OMB designated this rule as a significant regulatory action under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094. The estimated cost and transfer impacts of this regulatory proposal are provided below (see the sections titled "Federal cost estimate with implementation of this final rule" and "Estimated costs of this final rule to title IV-E agencies").

### Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) (see 5 U.S.C. 605(b) as amended by the Small Business Regulatory Enforcement Fairness Act) requires federal agencies to determine, to the extent feasible, a rule's impact on small entities, explore regulatory options for reducing any significant impact on a substantial number of such entities, and explain their regulatory approach. This rule does not affect small entities because it is applicable only to state and tribal title IV-E agencies. Therefore, a regulatory flexibility analysis is not required for this rule.

### Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) was enacted to avoid imposing unfunded federal mandates on state, local, and tribal governments, or on the private sector. That threshold level is currently approximately \$177 million. This rule does not contain mandates that would impose spending costs on state, local, or tribal governments in the aggregate, or on the private sector, in excess of the threshold.

### Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 2000 requires federal agencies to determine whether a policy or regulation may negatively affect family well-being. If the agency determines a policy or regulation negatively affects family well-being, then the agency must prepare an impact assessment addressing seven criteria specified in the law. This regulation does not impose requirements on states or families. This regulation will not have any impact on the autonomy or integrity of the family as an institution.

### Executive Order 13132

Executive Order 13132 prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule does not have federalism impact as defined in the Executive Order. Shortly after publication of the NPRM, we held a briefing session with states and tribes and any other interested partners on the contents of the NPRM.

## Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (Pub. L. 104-13) seeks to minimize government-imposed burden from information collections on the public. In keeping with the notion that government information is a valuable asset, it also is intended to improve the practical utility, quality, and clarity of information collected, maintained, and disclosed.

The Paperwork Reduction Act defines “information” as any statement or estimate of fact or opinion, regardless of form or format, whether numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic, or other media (5 CFR 1320.3(h)). This includes requests for information to be sent to the government, such as forms, written reports and surveys, recordkeeping requirements, and third-party or public disclosures (5 CFR 1320.3(c)). There is no burden to the Federal government or to title IV-E agencies as a result of this final regulation. First, it is optional for a title IV-E agency to develop separate licensing standards for relative and kinship foster family homes. If the agency elects to do so, there are no new reporting requirements. Second, title IV-E agencies are already required by section 471(a)(11) of the Act to conduct periodic reviews of the rates and standards related to FCMPs. Therefore, the final rule does not impose any new reporting requirements. Finally, title IV-E agencies were required to make changes consistent with Division E, Title VII of Public Law 115-123, the Family First Prevention Services Act. Therefore, the technical change will bring federal regulations up to date with title IV-E of the Act and does not impose any new reporting requirements.

## Annualized Cost to the Federal Government

*Total Projections to Implement Final Rule.* The estimate for the final rule was derived using fiscal year (FY) 2019 data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) on title IV-E relative foster family home placements and FY 2019 claiming data

from the Form CB-496 “Title IV-E Programs Quarterly Financial Report (Foster Care, Adoption Assistance, Guardianship Assistance, Prevention Services and Kinship Navigator Programs).” We did not use FY 2020 or 2021 data from AFCARS because such data would likely reflect anomalies due to the COVID-19 public health emergency period.

ACF estimates that, as a result of this final rule, there will be annual increases in the number of title IV-E relative foster family home placements and annual increases in federal costs for FCMPs and administration. ACF estimates that the final regulation will cost the federal government \$28,753,988 in title IV-E FFP for FCMPs and administration, the first year after the rule becomes final and \$3.085 billion over a total of 10 years.

*Assumptions:* ACF made several assumptions when calculating the cost of FCMPs and administrative costs for this final rule.

- First, we anticipate that without implementation of the final rule, the annual caseload growth rate (i.e., the increase in title IV-E relative and non-relative foster family home placements) will be one percent, and the annual title IV-E claiming growth factor will be two percent. We retain this same annual two percent claiming growth factor in estimating the FFP to implement the final rule because relative and non-relative foster family homes receive the same amount of title IV-E FCMPs.
- Second, we assume a varied implementation rate of placements in title IV-E eligible relative and kinship foster family homes that are licensed and approved under separate standards. The estimate assumes a slow rate of change because agencies may not immediately decide to implement new or revised relative foster family home licensing or approval standards. In addition, states and tribes vary on whether policy, regulation or statutory change must precede such changes.

- Finally, the title IV-E participation rate for relative foster family home placements was 27.6 percent in FY 2019. Conversely, the title IV-E participation rate for other foster care placements was 47.7 percent in FY 2019. We assume that this percentage will increase for relative and kin foster family home placements over time as a result of the final rule because it allows different licensing or approval standards for relative and kin and non-relative foster family home placements. to mitigate barriers that relatives and kin would otherwise face. We also assume that the difference in the title IV-E participation rate of relatives and non-relatives is almost entirely due to the use of the same licensing or approval standard for both relative and non-relative foster family home placements. We anticipate incremental changes in the title IV-E participation rate for relative and kinship foster family home placements over a total of 10 years, and that by year 10, this rate would increase to 41.7 percent.

Comment: One commenter disagreed with the way ACF determined the rate at which kinship foster family placements would increase under the proposed rule and the growth rate factor.

Response: We made no changes to the annualized cost to the Federal government in the final rule. As described in the Assumptions, the growth rate factor we used to identify projected caseload over the ten-year estimate period consists of two separate factors. The first factor is the overall rate of change for relative and non-relative placements in title IV-E eligible foster care children in care, for which we reviewed caseload data for past periods. The second factor is the extent to which relative and non-relative foster care placements are determined as title IV-E eligible. To the extent that title IV-E agencies implement separate standards in the final rule, the eligibility rate for relative home placements will increase in each year based on the expected implementation level. We projected the implementation level based on our experiences with the implementation for other program changes.

Comment: One commenter pointed out that the proposal does not consider in its analysis how adoption of a kinship licensing standard would potentially shift caseloads and costs from informal care paid through federal Temporary Aid for Needy Families (TANF) funding (via TANF child-only cases) to formal care paid through state and federal matching FCMPs via IV-E funding. The commenter requested that ACF assess these fiscal impacts in its final rulemaking.

Response: The cost analysis prepared for the February 2023 NPRM addresses costs under the title IV-E foster care program. We also note that while the TANF program does, to some extent, allow use of funds for payment of foster care maintenance payments for a child in foster care when placed with a relative, those funds are provided through a block grant that would not be reduced if some such cases were no longer being paid through TANF funds. Therefore, the rule would not result in a cost impact for the TANF program.

*Average title IV-E FCMP and administrative costs per child.* To determine the FY 2019 average FFP cost per child, we divided the total number of children in foster care in FY 2019 receiving title IV-E maintenance payments (170,446) by the total FFP claimed on the Form CB-496 for this time period. This resulted in an average title IV-E FCMP cost of \$9,240 per child; and an average title IV-E administrative cost of \$12,907 (this is the baseline FFP). We used the annual average per child costs to calculate the FFP that would be claimed over a total of 10 years with and without implementation of the rule. We made an assumption that 15 percent of the increased relative placement title IV-E caseload in each year would have already been subject to title IV-E claiming for administrative cost purposes (without the rule) based on current law that allows these costs for the period specified in the law, up to 12 months, that an application for licensure is pending (see section 472(i)(1)(A) of the Act).

Federal cost estimates without implementation of the rule.



*Line 1. Estimates of the number of title IV-E relative foster family home placements.* As of September 30, 2019, there were 36,953 title IV-E relative foster family home placements.

Applying our assumptions, on line 1 on the table below, we display the annual increases in title IV-E relative placements without implementation of the rule for 5 different years, beginning with FY 2023 and ending with FY 2032.

*Lines 2 through 5. Estimates of FFP for title IV-E relative foster family home placements.* To determine increases in the annual FCMP and administrative costs of title IV-E relative foster family home placements, we multiplied the average annual federal cost per child (lines 2 and 3) by the annual number of title IV-E relative foster home placements on line 1. On the table below, line 4 displays the increased FCMP costs and line 5 displays increased administrative costs for 5 different years beginning with 2023 and ending with 2032. The baseline FCMP costs for 2019 is  $\$9,240 \times 36,953 = \$341,462,572$ . The baseline administrative costs for 2019 is  $\$12,907 \times 36,953 = \$476,934,437$ .

Federal cost estimate with implementation of this final rule.

*Lines 6 and 7. Number of title IV-E relative foster family home placements.* On line 6 of the table below, we estimate the annual increases in title IV-E relative foster family home placements as a result of this final rule. We used a caseload growth rate of 5 percent in year 1, 15 percent in year 2, 25 percent in year 3, 45 percent in year 5. By year 10, this implementation rate is expected to reach 70 percent based on our assumptions described earlier. On line 7 of the table below, we determined the annual number of new title IV-E relative foster family home placements as a result of the regulation. To calculate the annual number of *new* title IV-E relative foster family home placements due to implementation of the final rule, we subtracted the projected caseload without application of the final rule on line 1 from the projected caseload of

the rule on line 6. For example, in 2023 there would be 1,392 new title IV-E relative foster family home placements:  $38,714 - 37,323 = 1,392$ .

*Lines 8 through 10. Annual federal costs of title IV-E relative foster family home placements.*

Lines 8 and 9 display the annual increases in FCMPs and administrative costs for the *new* title IV-E relative foster family home placements (on line 6) resulting from this final rule. To determine the annual federal cost of the NPRM on lines 8 and 9, we multiplied the annual number of new title IV-E relative foster family home placements on line 6 by the average child costs for FCMPs and administration on lines 2 and 3. This information is displayed for 5 different years beginning with 2023 and ending with 2032. For example, on line 8, the cost in 2023 for FCMPs is approximately \$13,117,787 (1,392 children x \$9,425 average FCMP). Line 10 displays the annual incremental federal costs of this final rule.

	2019 Baseline	2023 (Year 1)	2024 (Year 2)	2025 (Year 3)	2027 (Year 5)	2032 (Year 10)	Ten Year Total Cost
Estimates without regulatory changes							
1.Number of title IV-E relative placements @ 1% growth	36,953	37,323	37,696	38,073	38,838	40,819	--
2. Avg. title IV-E FCMP FFP claim per child@2%claiming growth factor	\$9,240	\$9,425	\$9,614	\$9,806	\$10,202	\$11,264	--
3. Avg. title IV-E Administrative cost FFP claim per child@2% claiming growth factor	\$12,907	\$13,165	\$13,428	\$13,696	\$14,250	\$15,733	--
4. FCMP cost	\$341,462,572	\$351,774,691	\$362,398,575	\$373,343,289	\$396,233,652	\$459,790,346	\$4,036,424,435
5.Administrative cost	\$476,934,437	\$491,337,785	\$506,176,589	\$521,463,509	\$553,435,395	\$642,207,572	\$5,637,835,507
Estimated FFP with regulatory changes							
	2019	2023 (Year 1)	2024 (Year 2)	2025 (Year 3)	2027 (Year 5)	2032 (Year 10)	Ten year total cost

6. Number of title IV-E relative placement @ varied caseload growth rates	36,953	38,714	41,849	45,042	51,609	61,680	--
7. Total annual increase in title IV-E relative placements	--	1,392	4,153	6,970	12,771	20,861	--
8. Annual increase in FCMP costs	--	\$13,117,787	\$39,926,838	\$68,344,565	\$130,295,804	\$234,976,401	\$1,304,789,018
9. Increase in administrative costs	--	\$15,636,201	\$50,233,323	\$89,758,368	\$175,938,591	\$324,690,283	\$1,780,051,762
10. Total incremental increase in FFP	--	\$28,753,988	\$90,160,161	\$158,102,933	\$306,234,395	\$559,666,684	\$3,084,840,780
Title IV-E agency estimates with regulatory changes							
	2019	2023	2024	2025	2027 (Year 5)	2032 (Year 10)	Ten year total cost
11. Maintenance Portion - Incremental Non-Federal Share (Using FY 2019 Avg. FMAP rate of 56.61%)	--	\$10,054,421	\$30,602,817	\$52,384,220	\$99,868,132	\$180,102,915	\$1,000,084,711
12. Administration Portion - Incremental Non-Federal Share (50% FFP)	--	\$15,636,201	\$50,233,323	\$89,758,368	\$175,938,591	\$324,960,283	\$1,780,051,762
13. Total Incremental Increase in Non-Federal Share	--	\$25,690,622	\$80,836,140	\$142,142,587	\$275,806,723	\$504,793,199	\$2,780,136,473

Estimated costs of this final rule to title IV-E agencies. Title IV-E agencies may claim

reimbursement for the federal cost of FCMPs and administrative costs, and the title IV-E agency

pays its share with state or tribal funds. Line 11 displays the agency’s estimated FCMP costs and line 12 displays the estimated agency costs for administration. Line 13 displays the total incremental increase in cost for the state/tribal share. This information is displayed for 5 different years beginning with 2023 and ending with 2032. The estimates provided are calculated using the national average federal medical assistance percentage (FMAP) rate of 56.61 percent for FY 2019 and an administrative cost FFP rate of 50 percent. This proposal is optional; therefore, agencies are not *required* to incur any costs.

### Accounting Statement

From a society-wide perspective, many of the effects estimated above are transfers. We did not receive any comments on the estimation of the portion that represents new resource use attributable to the proposed rule. As shown in the table below, for this final rule the full amounts are categorized as transfers—from either the federal government or Title IV-E agencies to Title IV-E participants.

Category		Primary Estimate (millions)	Units		
			Year Dollars	Discount Rate	Period Covered
	Federal Budget Transfers (annualized)	\$439	2019	7%	10 years
		\$362	2019	3%	10 years
	From/To	From: Federal government	To: Title IV-E participants		
	Other Transfers (annualized)	\$395	2019	7%	10 years
		\$326	2023	3%	10 years
	From/To	From: Title IV-E agencies	To: Title IV-E participants		

## **V. Tribal Consultation Statement**

Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments*, requires agencies to consult with Indian tribes when regulations have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes and either impose substantial direct compliance costs on tribes or preempt state law.

Similarly, ACF's Tribal Consultation Policy says that consultation is triggered for a new rule adoption that significantly affects tribes, meaning the new rule adoption has substantial direct effects on one or more Indian tribes, on the amount or duration of ACF program funding, on the delivery of ACF programs or services to one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This final rule does not meet either standard for consultation. Rather, it provides tribal title IV-E agencies an option for implementing separate licensing or approval standards for relative and kinship foster family homes. Accordingly, a tribal title IV-E agency can adopt separate licensing or approval standards for relative or kinship foster family homes but is not required to do so. Shortly after publication of the NPRM, we held a briefing session with title IV-E agencies and any other interested partners on the contents of the NPRM. In developing this final rule, we considered comments submitted by Indian tribes, tribal organizations and consortia, and organizations that represent tribal interests.

Jeff Hild, Acting Assistant Secretary of the Administration for Children and Families, approved this document on , 2023.

## **List of Subjects**

### **45 CFR Part 1355**

Administrative costs, Adoption Assistance, Child welfare, Fiscal requirements (title IV-E), Grant programs—social programs, Statewide information systems, Adoption and foster care, Child welfare, Grant programs—social programs.

### **45 CFR Part 1356**

Adoption and foster care, Child welfare, Grant programs-social programs.

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; 93.645, Child Welfare Services—State Grants).

Dated: September 22, 2023.

**Xavier Becerra,**

*Secretary,*

*Department of Health and Human Services.*

For the reasons set forth in the preamble, ACF amends 45 CFR parts 1355 and 1356 as follows:

## **PART 1355—GENERAL**

1. The authority citation for part 1355 continues to read as follows:

**Authority:** 42 U.S.C. 620 et seq., 42 U.S.C. 670 et seq.; 42 U.S.C. 1302.

2. In §1355.20 amend paragraph (a) by revising the definition of “Foster family home” to read as follows:

### **§1355.20 Definitions.**

(a) \* \* \* \* \*

*Foster family home* means, for the purpose of title IV-E eligibility, the home of an individual or family licensed or approved as meeting the standards established by the licensing or approval authority(ies), that provides 24-hour out-of-home care for children. The licensing or approval authority must be a state authority in the state in which the foster family home is located, a tribal authority with respect to a foster family home on or near an Indian Reservation, or a tribal authority of a tribal title IV-E agency with respect to a foster family home in the tribal title IV-E agency's service area. Agencies may establish one set of foster family home licensing or approval standards for all relative or kinship foster family homes that are different from the set of standards used to license or approve all non-relative foster family homes. Anything less than full licensure or approval is insufficient for meeting title IV-E eligibility requirements. Title IV-E agencies may, however, claim title IV-E reimbursement during the period of time between the date a prospective foster family home satisfies all requirements for licensure or approval and the date the actual license is issued, not to exceed 60 days.

\* \* \* \* \*

## **PART 1356 – REQUIREMENTS APPLICABLE TO TITLE IV-E**

3. The authority citation for part 1356 continues to read as follows:

4. Amend §1356.21 by revising paragraphs (m)(1) and (2), and adding paragraph (m)(3) to read as follows:

**§1356.21 Foster care maintenance payments program implementation requirements.**

\* \* \* \* \*

(m) \* \* \*

(1) The amount of the payments made for foster care maintenance to assure their continued appropriateness, and that the amount made to a licensed or approved relative or kinship foster family home is the same as the amount that would have been made if the child was placed in a licensed or approved non-relative foster family home;

(2) The amount of the payments made for adoption assistance to assure their continued appropriateness; and

(3) The licensing or approval standards for child care institutions and foster family homes.

\* \* \* \* \*